

ESTTA Tracking number: **ESTTA83572**

Filing date: **06/01/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Apple Computer, Inc.		
Entity	Corporation	Citizenship	California
Address	1 Infinte Loop Cupertino, CA 95014 UNITED STATES		

Attorney information	Jennifer D. Arkowitz Townsend and Townsend and Crew LLP 2 Embarcadero Center 8th Floor San Francisco, CA 94111-3834 UNITED STATES jda@townsend.com, jcb@townsend.com, D1H@townsend.com, litdocketing@townsend.com, bws@townsend.com Phone:415-576-0200
----------------------	--

Applicant Information

Application No	78590316	Publication date	05/02/2006
Opposition Filing Date	06/01/2006	Opposition Period Ends	06/01/2006
Applicant	MEMBRAIN LLC 450 North Roxbury Drive Beverly Hills, CA 902104222 UNITED STATES		

Goods/Services Affected by Opposition

Class 035. All goods and seVICES in the class are opposed, namely: PROMOTING THE SERVICES OF OTHERS THROUGH THE DISTRIBUTION OF AUDIO AND VISUAL CONTENTS, NAMELY PROMOTIONAL MATERIALS VIA THE INTERNET

Attachments	PODIBLE Notice of Opposition.pdf (6 pages)(265898 bytes)
-------------	---

Signature	/Jennifer D. Arkowitz/
Name	Jennifer D. Arkowitz
Date	06/01/2006

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application No. 78/590,316
Filed: March 18, 2005
Published: May 2, 2006 in the Official Gazette
For: **PODIBLE**

APPLE COMPUTER, INC.,

Opposer,

vs.

MEMBRAIN LLC,

Applicant.

Opposition No. _____

NOTICE OF OPPOSITION

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Dear Madam:

APPLE COMPUTER, INC. ("Opposer"), a California corporation, located and doing business at 1 Infinite Loop, Cupertino, California 95014, believes that it will be damaged by the registration in International Class 35 of the mark **PODIBLE** shown in Application Serial No. 78/590,316 filed by MEMBRAIN LLC ("Applicant"), a California limited liability company, with a mailing address at 450 North Roxbury Drive, Beverly Hills, California 90210-4222, and published in the Official Gazette of May 2, 2006, and hereby opposes registration thereof.

As grounds for opposition, Opposer alleges:

1. Opposer is the owner of Registration No. 2,835,698 for **IPOD** for "portable and handheld digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing audio files; computer software for use in organizing, transmitting, manipulating, and

reviewing audio files on portable and handheld digital electronic devices" in International Class 9. Opposer's application for said registration was filed on October 18, 2001 and matured to registration on April 27, 2004. Opposer's registration has a Convention priority date of August 31, 2001. Opposer has used the mark **IPOD** on and in connection with the sale of the aforementioned goods since at least as early as October 2001.

2. Opposer is the owner of Registration No. 3,089,360 for **IPOD** for "portable and handheld digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing text, data, and audio files; computer software for use in organizing, transmitting, manipulating, and reviewing text, data, and audio files on portable and handheld digital electronic devices" in International Class 9. Opposer filed the application for said registration on October 18, 2001, and it matured to registration on May 9, 2006. Opposer's registration has a Convention priority date of August 31, 2001 under § 44(d) of the Lanham Act, 15 U.S.C. § 1126(d). Opposer has used the mark **IPOD** on and in connection with the sale of the aforementioned goods since at least as early as October 2001.

3. Opposer is the owner of U.S. Trademark Application No. 78/521,796 for **IPOD** for "retail store services and retail store services provided via communications networks featuring computers, computer software, computer peripherals and consumer electronics, and pre-recorded music, audio-visual and music-related products; product demonstrations provided in-store and via communications networks; information and consultation in connection with all of the foregoing" in International Class 35 and "computerized data storage and retrieval services for digital music, photographs, and audio-visual and text words; information and consultation in connection therewith" in International Class 39. Opposer's application was filed on November 23, 2004 and has a Convention priority date of July 28, 2004 under § 44(d) of the Lanham Act, 15 U.S.C. § 1126(d).

4. Opposer is the owner of U.S. Trademark Application No. 78/521,891 for **IPOD** for "printed materials and publications, namely, books, magazines, newsletters, brochures, booklets, pamphlets, manuals, journals, leaflets, greeting cards, and catalogues all relating to computer software, computer hardware, consumer electronics, digital technology, telecommunications, on-line retailing, entertainment, music, movies and video, and multimedia apparatus and instruments; pens and pencils, clipboards, posters, memo pads, binders" in International Class 16. Opposer's application was filed on November 23, 2004 and has a Convention priority date of July 28, 2004 under § 44(d) of the Lanham Act, 15 U.S.C. § 1126(d).

5. Opposer is the owner of U.S. Trademark Application No. 78/532,252 for **IPOD** for "educational services in the nature of classes and training services offered in-person and over computer networks in the fields of K-12 education, university-level subjects, topics of general interest, and computer hardware and software applications; entertainment services in the nature of musical, video, audio-video, and textual materials, namely books, plays, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of sporting and cultural activities and a wide range of topics of general interest offered in-person and distributed over computer networks; providing electronic publications for browsing and downloading over computer networks, namely books, pamphlets, brochures, newsletters, journals, and magazines, on the subjects of computer hardware and software applications and a wide range of topics of general interest; editing of audio-tapes; editing of video-tapes; editing of written text; editing of photographic images; videotape editing; digital imaging services; providing information, advice and consultation services relating to all the aforesaid" in International Class 41. Opposer's application was filed on December 14, 2004 and has a Convention priority date of July 28, 2004 under § 44(d) of the Lanham Act, 15 U.S.C. § 1126(d).

6. Opposer is the owner of U.S. Trademark Application No. 78/459,101 for **POD** for "portable and handheld digital electronic devices for recording, organizing, transmitting, manipulating, and reviewing audio files, and peripherals for use therewith; computer software for use in organizing, transmitting, manipulating, and reviewing audio files on portable and handheld digital electronic devices" in International Class 9. Opposer's application was filed on July 29, 2004 and has a Convention priority date of January 30, 2004 under § 44(d) of the Lanham Act, 15 U.S.C. § 1126(d).

7. As a result of Opposer's extensive advertising, sales, and marketing, Opposer's **IPOD** mark is famous and well known to purchasers.

8. By virtue of Opposer's extensive use and promotion of the **IPOD** mark, Opposer has established valuable goodwill in the mark, and the public has come to associate the **IPOD** mark with Opposer. As such, the public has come to know **IPOD** as an indication of goods and services that originate from Opposer.

9. Applicant filed U.S. Trademark Application Serial No. 78/590,316 (the "Application"), which is the subject of this Opposition, on March 18, 2005, based on its intent to use the mark **PODIBLE** in connection with the Application, which covers, as amended, "promoting the services of others through the distribution of audio and visual contents, namely promotional materials via the internet" in International Class 35. Applicant's services as described in the Application are highly related and in part identical to the goods and services identified in Opposer's registrations and applications for its **IPOD** mark.

10. Opposer began use of its **IPOD** mark in connection with its goods and services at least as early as October 2001, which is well prior to the Applicant's filing date of March 18, 2005. The Convention priority date of Opposer's **IPOD** mark is as early as August 31, 2001, which similarly pre-dates the Application's March 18, 2005 filing date.

11. Applicant's **PODIBLE** mark is similar to Opposer's mark. As a result of the similarity between Opposer's **IPOD** mark and Applicant's **PODIBLE** mark and the highly related or identical nature of the goods and services of each respective mark, Applicant's mark is likely to cause confusion, mistake or deception in the trade and among purchasers as to the source, origin or sponsorship of the parties' respective goods and services.

12. Registration of the mark of the Application and use of the Applicant's mark are likely to dilute Opposer's famous **IPOD** mark.

13. Registration of Applicant's mark shown in the opposed Application will result in damage to Opposer under the provisions of § 2(d) of the Lanham Act, 15 U.S.C. § 1052(d) and § 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), pursuant to the allegations stated above.

14. If the Application is permitted to register, the registration would presumptively entitle Applicant to *prima facie* exclusive ownership and rights to the **PODIBLE** mark. Such registration would cause confusion among consumers as to the separate and distinct sources of Applicant's goods and services and Opposer's goods and services and the relationship of Opposer to Applicant, thereby damaging Opposer's goodwill in its **IPOD** mark, diluting the value thereof, and resulting in irreparable harm to Opposer's business and reputation, all to the detriment of Opposer who has expended considerable sums and effort in promoting its **IPOD** mark.

WHEREFORE, Opposer prays that this Opposition be sustained and that registration of U.S. Trademark Application Serial No. 78/590,316 be denied.

Please charge any necessary fee regarding this Opposition to the Deposit Account of Townsend and Townsend and Crew, LLP, 20-1430, and credit any overpayment to such deposit account.

Please direct all notices, pleadings and process regarding this matter to:

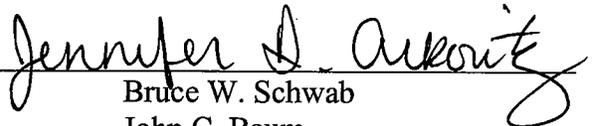
Jennifer D. Arkowitz, Esq.

TOWNSEND and TOWNSEND and CREW LLP
Two Embarcadero Center, 8th Floor
San Francisco, CA 94111-3834
Telephone: (415) 576-0200
Facsimile: (415) 576-0300
Email: jdarkowitz@townsend.com

Respectfully submitted,

TOWNSEND *and* TOWNSEND *and* CREW LLP

Dated: June 1, 2006.

By 
Bruce W. Schwab
John C. Baum
Jennifer D. Arkowitz
Attorneys for Opposer

60782800 v2